IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

MONDAY, THE 23RD JANUARY 2006 / 3RD MAGHA, 1927

FAO.No. 244 of 2005()

AGAINST THE ORDER DATED 13/10/2005 IN IA. 1821 /2004 IN OS.5/2004 of ADDL.DISTRICT COURT, KOZHIKODE

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APPELLANT/3RD RESPONDENT

MEENA DAS,
"HAPPY VILLA", KAKKANAD, COCHIN-30.

BY ADV. SRI.BABU JOSEPH KURUVATHAZHA

RESPONDENTS: PETITIONER/RESPONDENTS 1 & 2

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1. KHALID, S/O.KUNHAMMED,
MANAGING DIRECTOR, KILBAN FOODS(INDIA) PVT. LTD.,
12/526-A, POOVATTU PARAMBA, KOZHIKODE.

2. HARIDAS, PROPRIETOR,
M/S.HAPPY INDUSTRIES, CIVIL STATION ROAD,
KAKKANAD, COCHIN-30.

3. BABU, PROPRIETOR,
M/S.GOOD BEVERAGES, NJANKADAVU,
ADOOR ROAD, PUTHOOR P.O., KOLLAM DISTRICT,
PIN-691 507.

BY ADV. SRI.K.B.HARSHAN
SMT.T.RESMI DAMODARAN

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 23.1.2005, HE COURT ON 23/01/2006 PASSED THE FOLLOWING:

K. HEMA, J.

F.A.O.No.244 of 2005

Dated this the 23rd January, 2006

JUDGMENT

This appeal arises from an order passed by Ist Additional District Court, Kozhikode in an application filed by the plaintiff-first respondent herein under Order 39 Rule 1 and 2 of the Code of Civil Procedure and also under the provisions of the Trade Marks Act,. In the said application, court below granted an interim injunction against first defendant. Subsequently, appellant was impleaded in the petition as third respondent and she raised various contentions. But lower court disposed of the petition by passing the following brief order against appellant:

> "Heard. Since there is already an injunction against the first defendant, the order of injunction against the first defendant is made applicable to third defendant also. So this application is closed."

2. On going through the records and on hearing both sides, I find that the manner in which the petition was disposed of is totally unwarranted and not in accordance with law. When various contentions are raised and documents are produced by the parties in support of such contentions, the court is bound to pass a speaking order, after considering the rival contentions. The court shall also enter into definite findings on the disputed issues. In short, a speaking

order shall be passed in the matter, since principles of natural justice mandate such a course.

3. An order of injunction leads to serious consequences, affecting rights and liabilities of an individual. The court cannot meddle up with the rights and liabilities of an individual without lending its ear to the contentions raised and state why such contentions are acceptable or not acceptable. It is also well-settled that the court shall also consider, whose favour prima facie case lies and whether any irreparable injury will be caused to the party in case no order is passed his favour. The question of balance of convenience also requires to be considered, before passing an order of interim injunction against a person. All these are only fundamentals.

4. But, the court below deviated from all principles of law and it violated principles of natural justice while passing the impugned order. It failed to follow the settled principles to be followed while granting an interim injunction in favour of, or against a party, by not considering `prima facie case, balance of convenience and irrepairable injury' factors. The imugned order is unsustainable on these grounds themselves.

5. Third respondent-appellant took up a contention that she was not even made a party to the suit and hence, no interim injunction can be passed against a person who is not a party to the suit. The merit in this contention was not considered by the court below. She

also contended that she had obtained trade mark including the word `Happy', earlier to the use of the same by the plaintiff. Documents were also produced to show that trade mark including the name `Happy' was allotted to several other persons also. It was also contended that while appellant's application is in respect of Class 32 whereas the plaintiff's claim falls under Class 29 and those are totally different and uncomparable. Serious contentions were raised in paragraphs 4 to 6 of the counter statement. It is also contended that the Registrar of Firms had issued registration No.1726/'94 to M/s.Happy Construction, the business owned by the family. The contract of licence is obtained in the year 1982 itself. The alleged trade mark registration obtained by the plaintiff-first respondent is only subsequent in respect of M/s.Happy Construction. She also got trade mark registration with respect to the name, `Happy Dhahajalam' with its symbol for the manufacture and sale of products which come under Class 32 of the products classified under the Trade Marks Act. It is also pointed out that M/s.Happy Industries is permitted under Trade Marks Act to produce goods such as, beer, mineral and aerated waters and other non-Alchoholic drinks, syrups and other preparations for making beverages and other items in class-32 with the registered trade mark and symbol. But the first plaintiff has got trade mark registration only in respect of class-29, i.e., for ketch up, sauce group etc.

6. The first defendant also took up several other contentions and it has been specifically pleaded that plaintiff-first respondent has not acquired any right to use the mark in relation to his goods and the trade mark is also got registered. It is also contended that nobody else including the defendant is entitled to make use of his trade mark `Happy' in relation to any food product. It is also pleaded that he obtained trade mark in the year 1987 and from that period onwards, the plaintiff's firm alone is making food products under the same trade mark. The plaintiff is infringing the first defendant's trade mark and also passing the goods as if they were his products.

7. Thus, it is clear that the parties have raised serious contentions and without disposing of which, no order of interim injunction ought to have been passed. Without resolving any of factual disputes with reference to pleadings and documents, it will be improper and illegal to grant an injunction. The first defendant had also filed a detailed counter statement taking up various contentions. That also was not considered before passing an order against the first defendant in the I.A. but, such an order is made applicable to the appellant also. This was totally illegal and unjustifiable. At any rate, the order under challenge is bad in law and unsustainable and it is liable to be set aside and I do so.

8. Learned counsel for the first defendant submitted that an order may be passed to maintain status quo because the interim

stay granted has been vacated. On going through the records in this case, it is seen that the interim stay was granted and thereafter vacated also by this Court.

9. It was pointed out by learned counsel for first respondent-plaintiff that as per judgment dated 10.12.2004 this Court disposed of F.A.O.No.261 of 2004, which arose from an ex-parte interim injunction in the very same matter. While considering the appeal filed by the first respondent herein against the ex-parte injunction order, this Court considered the fact that the trial court was closing for X'mas holidays and it may not be possible to have the injunction application finally heard and disposed of by the court below before the end of 2004 and an order was passed by this Court granting a temporary injunction restraining the second respondent herein (first defendant in the suit) from using the trade mark of the plaintiff or the term `Happy' in any manner including in combination with any other words, figures and features etc. in relation to manufacture, advertisement, marketing including distribution and sale of any article of food including purified water till I.A.No.1821 of 2004 is finally heard and disposed of by the court below.

10. The above said order applies only to the second respondent herein and it was to continue till final disposal of the application or till 31.1.2005. The injunction application was finally disposed of in the manner which I have discussed in the judgment. In the above circumstances, the judgment in F.A.O.261 of 2004 also does

not persuade me to grant an interim injunction in favour of first respondent-plaintiff or even an order to maintain status quo, without going into the merit of the various contentions raised.

11. On hearing both sides, I find that on the facts and circumstances of this case, a detailed consideration of disputed facts are necessary either to grant or refuse interim injunction. So, it may not be proper on the part of this Court to go into the merits of the case in this appeal as it is likely to prejudice the decision to be taken in the I.A by the court below. If any observation is passed in this appeal, it will prejudice both parties and hence I am restraining myself from passing any observation on merits of the case.

In the above circumstances, the order under challenge is liable to be set aside and I do so. The court below is directed to consider all the relevant contentions raised by both sides and dispose of the matter in accordance with law, within one month from the date of receipt of a copy of this judgment.

The appeal is allowed.

K.HEMA, JUDGE

vgs.